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No. 80-576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LACLEDE GAS COMPANY, *Appellant,*

v.

PUBLIC SERVICE COMMISSION OF MISSOURI, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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December 19, 1980

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Laclede Gas Company ("Laclede"), the Appellant, hereby replies to the Motion to Dismiss or Affirm of the Appellee, the Public Service Commission of Missouri (the "Commission").

I. THE QUESTION BEFORE THE COURT IS NOT MOOT

In its Motion to Dismiss or Affirm, the Commission argues that this matter is moot because a decision on the merits would have no prospective or retroactive effect on the litigants (Motion, page 2). In support of this argument, Appellee (i) states that it has already adopted a

new rule limiting, and in certain respects denying, the right of a public utility to include in its allowable costs its prudently incurred advertising expenses, and (ii) cites the Missouri doctrine against retroactive ratemaking (Motion, pages 2-5).

Appellant submits that the very adoption and application of a modified rule with respect to advertising costs—a rule which is as fundamentally defective as the original rule—is sufficient evidence that the action complained of is "capable of repetition, yet evading review". *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 518 (1911); see *De Funis* v. *Odegaard,* 416 U.S. 312 (1974). Appellant is even now contesting the validity of the modified rule before the Commission and courts. Appellee's argument would have this Court deny review of the Commission's original order, and when the modified order is appealed, refuse to review that as well, so long as the Commission has in the meantime adopted a further modification. Appellee must not be permitted to create the opportunity to continually violate Appellant's First Amendment rights—albeit in a different manner each time—and yet evade judicial review. This is precisely the unacceptable gauntlet contemplated by *De Funis,* 416 U.S. at 319 (a decision upon which Appellee appears to rely)—a gauntlet of Commission regulations changing as frequently as every 18 to 24 months. (Jurisdictional Statement, pages 3-4, n.2.)

Unlike the situation in *Hall* v. *Beals,* 396 U.S. 45, 49 (1969), there is no "unlikely event" which will cause the repetition of the problem raised by Appellant. The Court need not speculate about contingencies whereby Appellant will be harmed. The action has in fact been repeated, the harm continues. And unlike *Market Street R. Co.* v. *Commission,* 324 U.S. 548 (1945), *rehearing denied,* 324 U.S. 890 (1945), victory on the merits in this proceeding would

have a beneficial effect on the Appellant. The Commission has not changed its policy of disallowing prudent advertising expenses, but simply its formulation. If Appellant prevails, the burden of this policy on the ability of Laclede to exercise its First Amendment rights will be lifted. See *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969).

Appellee's reliance on the doctrine against retroactive ratemaking to support its claim of mootness (Motion, pages 4-5) is similarly misplaced. Essentially, Appellee is asserting that no matter how serious the error of the Commission, this Court lacks jurisdiction to review that error on the ground that the doctrine against retroactive ratemaking precludes judicial remedial action.[1] The question of remedies is not now before this Court and, if this Court so orders, should be fashioned by the Missouri court on remand.

II. THE SUBJECT MATTER OF THIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION

Appellee argues that the Commission's order advances Missouri's interest in just and reasonable rates, and as such is immune from attack under the First Amendment, relying on this Court's decision in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 100 S.Ct. 2343, 48 U.S.L.W. 4783 (June 20, 1980) (Motion, page 8).

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1. Appellee's reference in this connection to *Board of Public Utility Commissioners* v. *New York Telephone Co.,* 271 U.S. 23, 31 (1926) (Motion, page 5) is misleading. That case did not involve the issue of the remedies open to a court upon reversal of the disallowance by a ratemaking agency of an operating expense. Appellee thus argues that denial of a stay by the Commission or the Missouri courts also precludes substantive judicial review.

Appellee misunderstands not only these criteria[2] but their application to the subject matter of this case, as well.

Thus, governmental infringement of commercial speech is permitted, notwithstanding the command of the First Amendment, only when the regulation concerned directly advances a substantial governmental interest asserted and only when the regulation is no more extensive than necessary to serve that interest.

Appellee first claims that the state interest being advanced by the subject regulation is "just and reasonable rates to consumers" (Motion, page 8) and cites as support for that proposition the decision of the Commission here in issue. *Laclede Gas Company,* Mo.P.S.C. Case No. GR-77-33, 25 P.U.R. 4th 51 (1978). Not surprisingly, the language of that decision does not supply support for that assertion, for Section 393.130 of the Missouri statutes provides only that all charges made by a gas corporation for gas "shall be just and reasonable and not more than allowed by law or by order or decision of the commission." Mo. Rev. Stat., § 393.130, Separate Appendix, page A-177. Missouri's interest, therefore, is in maintaining a utility's charges at levels that are "just and reasonable" not only insofar as consumers are concerned but insofar as investors in the utility are concerned as well. As this Court noted in *FPC* v. *Memphis Light, Gas & Water Division,* 411 U.S. 458 (1973) (at page 474):

> "[The] holding that the consumer interests were not furthered by the Commission's action is short of the application of the appropriate standard for

2. "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson,* 100 S.Ct. at 2351, 48 U.S.L.W. at 4785.

> review. As already noted, under *Hope Natural Gas* rates are 'just and reasonable' only if consumer interests are protected and if the financial health of the pipeline in our economic system remains strong."

Appellant not only mischaracterizes the State's interest but misconstrues the nature of advertising as well. As delineated in *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 63 (1935) (at page 72):

> "The suggestion is made that there is no evidence of competition. We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others. (Citation omitted.) When a business disintegrates, there is danger to the stockholders, but danger also to the customers in the cost or quality of service."

Furthermore, the Appellant does not adequately address the fourth criterion of *Central Hudson*. It has made no showing that its regulation is no more extensive than necessary to serve the State's interest, the very showing that is explicitly required by *Central Hudson*. The First Amendment requires more than an administrative agency's determination that information should be suppressed because it conflicts with current agency doctrine.

Consequently, under the criteria set forth in *Central Hudson*[3] a substantial Federal question is presented.

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3. Appellee quotes (Motion, page 9) a part of note 11 of the Court's decision in *Central Hudson* (100 S.Ct. at 2352, 48 U.S.L.W. at 4786) in support of its argument that a determination to disallow recovery of advertising expenses in ratemaking will not result in the discouragement of such advertising. In fact, the Court concluded the reverse—that permitting utilities to pass on such costs, as unregulated businesses regularly do, does not distort the economic decision to advertise.

Appellee also claims that indirect infringements of speech are permitted if the speaker is a "regulated business in a monopoly position." (Motion, page 7.) As set forth above, however, the decision in *Central Hudson* effectively rejected the contention that a regulated business is not entitled to the First Amendment's protection of commercial speech.

Appellee further argues that its guidelines are sufficiently clear so as not to be unconstitutionally vague, referring to prior Commission decisions. (Motion, pages 10-11). In the light, however, of its recent admission that it has found "a problem in determining whether content of advertising conforms with policy statements which range from 'promotional' to 'informational' to 'political'" (Laclede Gas Company, Mo. P.S.C., Case No. GR-78-148, 27 PUR 4th 241, 250 (1978)), and as a result has changed its standards, surely it is a fair characterization of the earlier rule to say that it was so vague that Laclede could do no more than "guess at its meaning". See *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976).

CONCLUSION

For all of the foregoing reasons, the Appellant respectfully submits that the Federal question presented by this appeal is substantial and of public importance and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: December 19, 1980

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 1980, copies of the foregoing Brief Opposing Motion to Dismiss or Affirm were mailed, by first class mail, postage prepaid as follows:

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